IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTEHRN DISTRICT OF TEXAS
HOUSTON DIVISION

RUBEN and IRENE DELGADO, and PRESTON CLAYTON,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. H-02-0673
	§	AND CONSOLIDATED LEAD NO. H-01-3624
ANDREW S. FASTOW, KENNETH L. LAY, JEFFREY J. SKILLING, ROBERT A. BELFER, NORMAN P. BLAKE, JR., RICHARD B. BUY, RICHARD CAUSEY, RONNIE C. CHAN, JOHN H. DUNCAN, JOE H. FOY, WENDY L. GRAMM, KEN L. HARRISON, ROBERT K. JAEDICKE, MICHAEL J. KOPPER, CHARLES A. LEMAISTRE, REBECCA MARK-JUSBASCHE, JOHN MENDELSOHN, JEROME J. MEYER, PAUL V. FERRAZ PEREIRA, FRANK SAVAGE, JOHN A. URQUHART, JOHN WAKEHAM, CHARLES E. WALKER, BRUCE WILLISON, HERBERT S. WINOKUR, JR., BEN GLISAN, KRISTINA MORDAUNT, D. STEPHEN GODDARD, JR., DAVID DUNCAN, and ARTHUR ANDERSEN, L.L.P.	§	
	§	
Defendants.	§	

MEMORANDUM IN SUPPORT OF
MOTION TO REMAND

TO THE HONORABLE COURT:

Plaintiffs Ruben and Irene Delgado and Preston Clayton file this Memorandum in Support of their motion to remand the present action to the 55th Judicial District Court of Harris County, Texas. In support of remand, Plaintiffs show the Court the following:

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I. INTRODUCTION

Defendant Arthur Andersen, L.L.P. (Andersen) removed this action based solely on the Securities Litigation Uniform Standards Act of 1998 (SLUSA). For removal to be proper under SLUSA, Andersen must meet all statutory elements, including the threshold requirement that a case be a "covered class action" with more than fifty plaintiffs.

To reach the jurisdictional minimum, Andersen improperly aggregated the plaintiffs herein with plaintiffs in other cases pending in other state district courts in Harris County and other counties in the State of Texas. Andersen also speculated that clients represented by Plaintiffs' counsel may become plaintiffs in possible future filings in some other state district court at some point in time.

The plain language of SLUSA and standards of review applied to removal cases do not permit Andersen to create jurisdiction in such a manner. Therefore, because removal was improper, the Court lacks subject matter jurisdiction. It should remand the action to the 55th Judicial District Court of Harris County, Texas.[1]

II. ARGUMENT

A. Andersen Does Not Satisfy Stringent Removal Standards

1. Doubts Must be Resolved in Favor of Remand

Federal courts generally construe removal statutes strictly to prevent encroachment on state courts' jurisdiction and to preserve comity, as well as to protect plaintiffs' rights to fair treatment. *See, e.g., Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-09 (1941); *Leffall v. Dallas Indep. Sch. Dist.*, 28 F.3d 521, 524 (5th Cir. 1994). Thus, because federal courts are

[1] One court (Hon. Harry Lee Hudspeth), rejecting Andersen's argument, has ordered an action remanded under SLUSA. *See Bullock, et al. v. Arthur Andersen, L.L.P., et al.*, No. A-02-CA-070-H; in the United States District Court for the Western District of Texas, Austin Division. A copy of the order is attached to Plaintiffs' motion to remand at Tab 1.

courts of limited jurisdiction, they will remove only those cases that could have been brought originally in federal court. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A case should be remanded if a court has any doubts about the existence of federal jurisdiction. *See, e.g., Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 694 (5th Cir. 1995); *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir. 1988), *aff'd*, 503 U.S 131 (1992).

Therefore, a removing defendant bears the heavy burden of establishing the jurisdictional prerequisites. *See, e.g., Frank v. Bear Stearns & Co.*, 128 F.3d 919, 921-22 (5th Cir. 1997), *modified*, 1997 U.S. App. LEXIS 36785 (5th Cir. Dec. 19, 1997); *Burden v. General Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d at 365; *Jernigan v. Ashland Oil, Inc.*, 989 F.2d 812, 815 (5th Cir. 1993), *cert. denied*, 510 U.S. 868 (1993). As shown below, Andersen cannot meet that burden.

2. A Question of Federal Law Must Appear on the Face of the Complaint

Plaintiffs are generally masters of their complaints. *See Avitts v. Amoco Prod. Co.*, 53 F.3d 690, 693 (5th Cir. 1995) (citations omitted). Therefore, they may decline to litigate in federal court, choosing instead to proceed in state court "on the exclusive basis of state law." *See Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d 362, 366 (5th Cir. 1995).

Despite a plaintiff's choice, however, a case will arise under federal law if the complaint establishes that federal law creates the cause of action, or if the right to relief necessarily depends on the resolution of substantial questions of federal law. *See Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 10 (1983). Neither situation applies here; federal law is not implicated.

B. Andersen Does Not Satisfy SLUSA's Requirements for Removal

1. Removal Under the Securities Litigation Uniform Standards Act

Andersen based its removal of this action on the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227. Under SLUSA, certain securities cases are removable if they meet statutory requirements. But before any action may be removed under SLUSA, the removing party must prove that the action is a "covered class action" under SLUSA; the action purports to be based upon state law; the action involves a "covered security" under SLUSA; the defendant is alleged to have misrepresented or omitted a material fact; and the alleged misrepresentation or omission was made "in connection with" the purchase or sale of the covered security. 15 U.S.C. §§ 77p, 78bb (f)(1-2). For a case to qualify as a "covered class action," damages must be sought "on behalf more than 50 persons or class members." *See* 15 U.S.C. § 77 p(f) (2) (A).[2]

2. Individual Lawsuits Do Not Fall Within SLUSA

Andersen's removal of this action hinges on the threshold issue of whether the case qualifies as a "covered class action" under SLUSA. The plain language of the statute establishes that it does not.

Statutory construction must begin with congressional language and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985); *see also United States v. Hernandez-Avalos,* 251 F.3d 505, 510 (5th Cir. 2001) ("more important to our decision [to affirm] is that the statutory language is clear"). Therefore, if a statute's language is plain, a court must "presume

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[2] Alternatively, a "group of lawsuits filed in or pending in the same court" may qualify under SLUSA if the plaintiffs total more than fifty **and** the lawsuits are "joined, consolidated or otherwise proceed as a single action." *See* 15 U.S.C. § 77 p(f)(2)(A). As shown below, consolidation under SLUSA does not cure an improperly removed case.

that Congress said what it meant and meant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (citation omitted). In such cases, the sole function of the court is to enforce the statute according to its terms. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (if statute is unambiguous, judicial inquiry is complete).

SLUSA is unambiguous; its meaning is plain and clear on its face. The only reasonable interpretation of the statute is that certain class actions related to the sale of securities are "covered class actions" subject to SLUSA. Individual actions, filed in state court and brought on behalf of fewer than fifty plaintiffs, are not.

Nowhere in SLUSA is any provision made for the aggregation of plaintiffs in separate cases (or individuals in no cases, as Defendants do here) to form one class. And no law—SLUSA or otherwise—permits the transformation of individual actions to class actions. No authority stands for the proposition that SLUSA reaches or is meant to reach individual securities-related actions. Indeed, case law holds the exact opposite. *See In re Transcrypt Int'l Secs. Litig.*, 57 F. Supp. 2d 836, 842 (D. Neb. 1999) ("the scope of the statute does not purport to reach private, individual actions in state court"; relying on "Findings" section of SLUSA). Another district court reached the identical conclusion. Relying on a House Report concerning the congressional intent behind SLUSA, the court quoted the following language:

> [I]n order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits . . . **and not chang[e] the current treatment of individual lawsuits.**

See Riley v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 168 F. Supp. 2d 1352, 1355 (M.D. Fla. 2001) (citation omitted) (emphasis supplied). The court then continued by stressing the obvious:

> As is clear by the language of the House Report, SLUSA does not attempt to preempt all state law in the field of securities . . . . Rather, SLUSA bars. . . a class action arising under the enumerated circumstances described in SLUSA. . . . The operative language in **SLUSA poses no bar to pursuit of individual actions regarding securities in state courts**, or to class actions which fall outside of the limitations of 15 U.S.C.A. § 78bb(f).

Id. (citations omitted) (emphasis supplied).

This case belongs in state court. The Court should order it remanded.

3. Speculation About Future Filings Cannot Support Removal

Since Andersen cannot overcome SLUSA's requirements, it contends that Plaintiffs' counsel "represents over 750 clients who seek or will seek recovery related to Enron's financial difficulties from Andersen and the other defendants." *See* notice of removal ¶ 9. From that premise, it concludes that the Court should consider unknown clients in unfiled cases to establish its jurisdiction.

Andersen violates fundamental tenets of removal jurisdiction in expecting the Court to speculate as to future unknown filings to find the existence of subject matter jurisdiction. First, Plaintiffs are masters of their pleadings *See, e.g., Carpenter v. Wichita Falls Indep. Sch. Dist.*, 44 F.3d at 366. Therefore, they are permitted to advance only state claims on behalf of a limited number of plaintiffs should they so choose. Second, the Court's role is not to engage in speculation about uncertain events such as possible filings, which may or may not occur at unknown dates. Rather, the Court should review Plaintiffs' pleading as it existed at the time of removal for purposes of determining its jurisdiction. *See, e.g., Lindsey v. Alabama Tel. Co.*, 576 F.2d 593, 595 (5th Cir. 1978) ("Since the 'status of the cases as disclosed by the plaintiff's complaint is controlling in the case of a removal,' . . .it was not open for defendants to attempt to show [diversity jurisdiction]. Nor was it open to the district court to speculate that such was in

fact the case.") (internal citation omitted); *Bristol-Myers Squibb Co. v. Safety Nat'l Cas. Corp.*, 43 F. Supp. 2d 734, 742 (E.D. Tex. 1999) ("[T]he motion to remand cannot be decided on the basis of what may happen following a remand. Federal district courts must judge their jurisdiction on the status of cases at the time of removal.") (citation omitted).

The removal record establishes that Plaintiffs' original petition brought only state causes of action against Andersen and a number of individual defendants. Any conjecture beyond the face of their pleading is too remote to support subject matter jurisdiction.

C. Consolidation of This Case with *Newby* Presents No Impediment to Remand

On December 12, 2001, an order was entered consolidating a group of cases pending in the Southern District of Texas. This Court ordered the present action consolidated with the lead case, *Newby, et al. v. Enron, et al.*, shortly after removal.

In addressing the effect of consolidation, the U.S. Supreme Court has held that:

> [C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single case, or change the rights of the parties, or make those who are parties in one suit parties in another.

See Johnson v. Manhattan Ry. Co., 289 U.S. 479, 496 (1933). Following that principle, the Fifth Circuit directs a court to "view each consolidated case separately to determine the jurisdictional premise upon which each stands." *See Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 287 (5th Cir. 1989) (citations omitted); *see also In re Excel Corp.*, 106 F.3d 1197, 1201 (5th Cir. 1997), *cert. denied*, 522 U.S. 859 (1997) ("instruct[ing] the district court to consider each plaintiff's motion to remand on a case by case basis") (citations omitted); *Bristol-Myers Squibb Co. v. Safety Nat'l Cas. Co.*, 43 F. Supp. 2d at 745 (recommending remand of one of two cases).

In short, *Delgado*'s status as a consolidated case does not cure its jurisdictional defect and thus does not preclude remand. Therefore, because removal was improper, the Court should remand the action for lack of subject matter jurisdiction.

III. CONCLUSION

For all reasons above, this Court lacks subject matter jurisdiction under the Securities Litigation Uniform Standards Act. Therefore, it should order the action remanded to the 55th Judicial District Court of Harris County, Texas, where it was originally filed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Memorandum in Support of Motion to Remand has been provided to all parties as indicated on the attached Service List on this the 12th day of March, 2002 by First Class United States Mail, postage prepaid.

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